

Case No.: 05-3538

Death Penalty Case

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

MARVALLOUS KEENE

Petitioner-Appellant,

vs.

MARGARET BRADSHAW, WARDEN,

Respondent-Appellee.

**On Appeal from the United States District
For the Southern District of Ohio**

**THE WARDEN'S MEMORANDUM IN OPPOSITION / RESPONSE TO
KEENE'S MOTION TO REMAND**

Respectfully submitted,

JIM PETRO

Attorney General of Ohio



CHARLES L. WILLE (0056444)

Principal Assistant Attorney General

Capital Crimes Section

30 East Broad Street, 23rd Floor

Columbus, Ohio 43215-3428

(614) 728-7055; (614) 728-8600 (fax)

COUNSEL FOR THE WARDEN

STATEMENT OF THE CASE AND FACTS

The Appellant, Marvallous Keene (hereinafter "Keene") is under an Ohio sentence of death. On May 26, 2000, Keene filed with the United States District Court for the Southern District of Ohio a petition for a writ of habeas corpus. The case subsequently was referred to United States Magistrate Judge Michael Merz. On August 25, 2004, Magistrate Judge Merz issued a final report and recommendations in which he recommended that the petition be dismissed with prejudice. On October 7, 2004, Keene filed timely objections to the report and recommendations. On February 24, 2005, Magistrate Judge Merz issued a supplemental report and recommendations in which he again recommended dismissal of the petition with prejudice. Keene did not file objections to the supplemental report.

On April 20, 2005, the District Court overruled Keene's objections to the original report and recommendations and, consistent with the Magistrate Judge's recommendations, issued final judgment in the Warden's favor. On May 3, 2005, Keene filed a notice of appeal to this Court. On July 25, 2005, consistent with a scheduling order issued by the District Court, Keene filed with the District Court a motion for a certificate of appealability. On September 8, 2005, the Magistrate Judge issued a report and recommendations in which he recommended that a

certificate of appealability be denied. On September 26, 2005, Keene filed a motion for leave to file objections to the supplemental report and recommendations issued on February 24, 2005. The Magistrate Judge subsequently recommended that Keene's motion be denied. On November 23, 2005, the District Court adopted the Magistrate Judge's recommendations, including his recommended denials of Keene's motion for a certificate of appealability and his motion for leave to file objections to the supplemental report and recommendations. While affirming the Magistrate Judge's finding that Keene's objections to the supplemental report were untimely, the District Court also reviewed the objections and found that the objections "would not have affected the outcome of the issues presented." *See* Order (Doc. 121), page 5.¹

On March 17, 2006, the Warden was served by mail with Keene's motion to this Court for remand to the District Court.

¹ On December 20, 2005, Keene filed a notice of appeal to this Court of the District Court's order.

ARGUMENT IN OPPOSITION/RESPONSE

Keene asks this Court to remand to the District Court, solely for the purpose of permitting the District Court to consider his objections to the Magistrate Judge's supplementary report and recommendations issued on February 24, 2005. Keene candidly acknowledges that he seeks a remand to avoid a holding by this Court that he has waived appellate review of issues addressed in the supplemental report, by virtue of his failure to file timely objections. *See Thomas v. Arn*, 474 U.S. 140 (1985).

The Warden opposes Keene's motion for the following reasons. First, as correctly stated by Keene, the Warden does not intend to argue that Keene has waived appeal of any issue by virtue of his failure to lodge objections to the supplemental report and recommendations. To the Warden's knowledge, this Court has never held that *Thomas v. Arn* requires a party to object to a supplementary report and recommendation by a Magistrate Judge that is issued in response to a party's objections to the Magistrate Judge's initial recommendation, and merely reiterates the Magistrate Judge's initially recommended disposition. *See also Thomas v. Arn*, 474 U.S. at 155 (requirement for objection is not jurisdictional). Second, a remand is not necessary, as the District Court considered Keene's belated objections and held explicitly that the objections would not have affected the decision denying Keene's petition.

The Warden therefore asks that the Court deny Keene's motion.

Respectfully submitted,

JIM PETRO

Attorney General of Ohio



CHARLES L. WILLE (0056444)

Principal Assistant Attorney General

Capital Crimes Section

30 East Broad Street, 23rd Floor

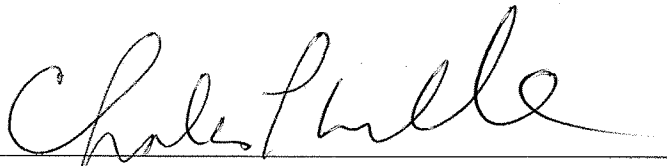
Columbus, Ohio 43215-3428

(614) 728-7055; (614) 728-8600 (fax)

COUNSEL FOR THE WARDEN

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing *The Warden's Memorandum in Opposition/Response* have been forwarded by first-class U.S. Mail, postage pre-paid to: Pamela Prude-Smithers and Kelly L. Culshaw, 8 East Long Street, 11th Floor, Columbus, Ohio, 43215, on this 27th day of March, 2006.



CHARLES L. WILLE

Principal Assistant Attorney General